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Supreme Court of the United States

OCTOBER TERM, 1949
No. 674

ARMAND GRÉGOIRE,

Petitioner,

against

FRANCIS BIDDLE, TOM C. CLARK, EDWARD J. ENNIS W. FRANK WATKINS and THOMAS M. COOLEY, IId,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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SUPREME PRINTING CO., INC., 41 MURRAY STREET, N. Y. 7, BARCLAY 7-0349

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PETITION FOR WRIT OF CERTIORARI

(*Reference to folios of record, unless otherwise indicated*)

Proceedings Below

The petitioner Armand Grégoire, the plaintiff in this action, prays for a writ of certiorari so that this court may review the decision and judgment herein of the United States Court of Appeals for the Second Circuit, made by the Honorable Learned Hand, C. J., and Swan and Clark, J. J., and entered on October 24th, 1949 (pp. 20 to 29). The Court of Appeals in its said judgment affirmed the order and judgment herein of the United States District Court for the Southern District of New York, made by the Honorable John W. Clancy, D. J., and entered on December 13, 1948 (43 to 48). The judgment of the District Court

granted a motion of defendants Clark, Ennis and Watkins to dismiss the complaint, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, on the ground that the complaint fails to state a claim on which relief may be granted, and dismissed the complaint on the merits (47), and this judgment was affirmed as aforesaid by the Court of Appeals.

Opinions Below

The opinion of the District Judge of December 3, 1948 is set forth on folios 31 to 48 of the record. It has not been officially reported. The opinion of the Court of Appeals for the Second Circuit is annexed to the record as pages 20 to 26. It has been reported in 177 F. 2d 579.

Jurisdiction

The judgment of the Court of Appeals was entered on October 24, 1949, and this petition for certiorari will be filed on or before March 20, 1950, the time to apply for certiorari having been timely extended by order of Mr. Justice Jackson of this court. The jurisdiction of this court rests on 28 U. S. C. 1254 (1).

Statement Concerning the Records and Facts Before This Court

Inasmuch as the complaint herein has been dismissed upon a motion addressed to the pleadings, the question whether or not the complaint states a cause of action on which relief may be granted must be spelled out from the language of the complaint (7 to 23). However, Judge Clancy

took judicial notice (32) of the record of the United States District Court for the Southern District of New York in the previous proceedings entitled *U. S., ex rel. Grégoire* v. *Watkins,* a habeas corpus proceeding in which the plaintiff herein was the relator and the writ was sustained by the Honorable John C. Knox, U. S. D. J. Judge Knox's said decision is reported in (1946) 69 F. Supp. 889. Judge Clancy took further notice of the record on appeal from Judge Knox's said decision to the Court of Appeals for the Second Circuit, whose decision is reported in (1947) 164 F. 2d 137. The record of said habeas corpus proceeding will be handed up together with this petition. The petitioner will, in this petition and in the brief accompanying it, have occasion to refer to said record on appeal in the habeas corpus proceeding. Such references to the record in the habeas corpus proceeding will commence with the letters HC and be followed by a number indicating the folios of said record. It is pointed out, however, that the Court of Appeals in its decision in this case did not consider the habeas corpus record. Judge Learned Hand's decision expressly states (p. 21):

> "We lay aside any extenuating facts, which we might gather from the record in *United States ex rel. Grégoire* v. *Watkins, supra*[1] not because we should not be free to consider them if need were; because we think that the complaint should not stand, * * *"

The record of the habeas corpus proceeding therefore was only conditionally before the Court of Appeals.

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[1] *U. S. ex rel. Gregoire* v. *Watkins,* 164 F. 2d 137; *Ira S. Bushey & Sons* v. *Hedgey Transportation Corp.,* 167 F. 2d 9, 12 (Note 2).

Facts and Matter Involved

The plaintiff was born in Metz, Lorraine, in October, 1894. His father was born in France prior to the cession of Alsace-Lorraine to Germany under the Treaty of Frankfurt of 1871. Plaintiff's father therefore was a natural-born citizen of France. When Alsace-Lorraine reverted to France in 1920, the plaintiff became under the terms of the Treaty of Versailles reinstated to French citizenship and birthright. He has, to this day, remained a citizen of France.

The plaintiff in 1937 married an American citizen, Mrs. Crystal Smith Grégoire. Mrs. Grégoire was fortunate enough to escape from France, prior to the arrival of the Germans in 1940. She was pregnant at that time and her return to the United States was prompted by the desire of giving birth to her child on the soil of the United States of America (HC 107, 108). The plaintiff was unable to accompany his wife at that time. As a healthy man of forty-five years he was subject to the French draft laws and not permitted to leave his country, which was in the throes of war (HC 110). After the fall of France in June, 1940 these considerations subsided and the plaintiff made sustained efforts to obtain a quota immigration visa to the United States. He succeeded and arrived here in March, 1941 (HC 111).

Up to the time of his admission to the United States, the plaintiff had been for about twenty years a lawyer in France (HC 102). He had enjoyed an unblemished reputation and was in good standing. In 1930 he had been sent as one of the representatives of the French bar to the United States, where he addressed the New York County Lawyers Association and the Harvard Law School (HC 237, 238).

Having done no hostile acts, having uttered no dangerous or hostile words, having lived peacefully and honorably with his wife and child in California; having at all times been well disposed toward the happiness and good order of France and of the United States; having given offense to no one, he was, on January 5, 1942, arrested as a German alien enemy, by order of defendant Biddle, with the connivance of the defendants Ennis and Cooley, and kept imprisoned first by them and subsequently by the defendants Clark and Watkins. All of these defendants made persistent efforts to deport this loyal and law abiding Frenchman to Germany.[2] Without a scintilla of proof of hostile intentions or illegal or detrimental acts, or even thoughts, on the part of plaintiff, and solely because of their personal animosity against him (p. 24), these defendants held this innocent man incarcerated for almost five years and tried to deport him into the camp of the common enemy of the United States and France. Fortunately for the plaintiff, Judge Knox and the Court of Appeals for the Second Circuit in the habeas corpus proceeding put an end to these uncondonable acts.

In the present complaint this greatly wronged and humiliated man steps forward to seek redress of his grievances, by making his tormentors answerable in damages.

The first cause of action is for false imprisonment. It states (8 to 19) that the plaintiff is a native and citizen

---

[2] The only statutory power under which defendants purported to act was the limited power to restrain alien enemies (11-12). *They had no statutory power whatever over friendly aliens,* such as Frenchmen, and did not purport to be exercising any such power, at least not before this litigation was commenced (cf. footnote 4, *infra*).

of France, that he entered the United States legally under the French quota as a quota immigrant on March 30, 1941; that he has at all times conducted himself as a loyal and law-abiding resident of this country.

That nevertheless the plaintiff was arrested and held in confinement as an alien enemy from January 5, 1942 until released on September 13, 1946 by order of Judge Knox in the habeas corpus proceeding, 69 F. Supp. 889, which order was affirmed by the Court of Appeals in 164 F. 2d 137.

The complaint states that this confinement was illegal and without authority of law and that the defendants prior to plaintiff's arrest and thereafter wilfully and maliciously conspired together and entered into a scheme and conspiracy to deprive the plaintiff, together with many other persons, among them dozens of members of allied and neutral nations, of his liberty, to plaintiff's damage in the sum of $250,000.

The second cause of action refers to the facts stated in the first cause of action and bases a claim for damages upon Sections 43, 47 and 48 of Title 8, U. S. C., i.e., upon the Civil Rights Act. For the details of said allegations, reference is made to the complaint (pp. 3 to 8).

The defendants Clark, Ennis, and Watkins moved to dismiss the complaint on the ground of insufficiency. The defendants Biddle and Cooley were never served with process nor did they appear.

Upon this motion the complaint was dismissed as aforesaid. Plaintiff claims that the decisions below are erroneous and prays that certiorari should be granted.

Questions Presented

1. Does the immunity of judges from being sued in tort for their judicial acts extend to federal officials

   a. on the cabinet level?

   b. on the level of assistants to the Attorney General?

   c. on the level of a district director of immigration?

The courts below answered all these questions "yes". It is contended that the answers should be "no".

2. Does any immunity of federal officials from being sued for false imprisonment extend to acts prompted solely by ill-will and malice and in excess of their statutory powers and duties?

The courts below answered these questions "yes". It is contended that the answer should be "no".

3. Must the prohibitions and liabilities of the Civil Rights Act, contrary to their language, be confined to state officials, and are federal officials exempt from the Civil Rights Act?

The courts below answered this question "yes". It is contended that the answer should be "no".

Reasons Why Certiorari Should be Allowed

The reasons why certiorari should be allowed are set forth in detail in the brief accompanying this petition. Reference is made to the brief. It should however be emphasized here that counsel for the petitioner has been unable to find a decision of this Court which determines whether federal officials may be sued for false imprisonment or under the Civil Rights Act for acts done by them maliciously and in excess of their statutory powers and duties.

The decision of the Court of Appeals in the present case has ominous implications. The rule of law from which redress is sought is stated as follows:

> "We think that this complaint should not stand, even though under Rule 9 (b) we read the allegation that the defendants arrested the plaintiff 'maliciously and wilfully', as though it had specifically alleged that they had acted altogether from personal spite and had been fully aware that they had no legal warrant for arresting or deporting the plaintiff. True, so stated, that seems at first blush a startling proposition; but we think, not only that it necessarily follows from the decision of the Supreme Court in Yaselli v. Goff, [275 U. S. 503, 48 S. Ct. 155, 72 L. Ed. 395—a memorandum *decision based, as will be shown,* on much narrower facts] but *that, as a new question, the result is desirable.*" (Italics supplied).

This proposition of law, if allowed to stand, would sound the death knell of civil liberties in the United States of America. With this ominous principle, issue is taken in this petition. Rarely has this court been confronted with

a more fundamental issue in the eternal conflict between freedom of the individual and tyranny. These defendants are two top level public officials, two medium level officials, and a District Director of Immigration. The Court of Appeals held that none of them is liable for malicious abuse of his cloak of office, that each of them may arrest and hold in confinement as an alien enemy a person known to them not to be an alien enemy but an ally, a neutral or even a citizen of the United States; in brief, it held that each may with impunity exceed the limited powers given to them by Congress and commit a tort to boot while so doing. If this is the law, the office holder has become almighty in the United States and we have ceased to be the land of the free. If this is the law, the Attorney General could, under the pretense that he is an alien enemy, arrest the Chief Justice of this Court and run no hazard of retribution. This petition therefore poses a question of federal law whose importance cannot be exaggerated.

WHEREFORE, it is respectfully prayed that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit.

New York City
March 10, 1950

Respectfully submitted,

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Supreme Court of the United States

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BRIEF IN SUPPORT

POINT I

The defendants herein do not participate in the immunity of judges from liability for their torts.

The defendants herein are charged in the first count with having for a period of four years and nine months falsely imprisoned the plaintiff. The persons so charged are two successive attorneys general, two successive directors of the Alien Enemy Control Unit of the Department of Justice, and a District Director of the Immigration and Naturalization Service in the New York District. The acts complained of were performed when the defendants were in public office and by color thereof.

The complaint charges that the defendants held plaintiff confined as a German alien enemy although they knew he was a Frenchman and not a German, and hence not an alien enemy, and that their statutory powers were expressly limited to alien enemies (11-12).

The complaint in its first count alleges (18) that the defendants conspired together to deprive the plaintiff—over whom they had no statutory powers—of his liberty, that defendants did so "maliciously and wilfully", that they acted thus pursuant to a scheme directed against many persons (compl. par. 22), among them dozens of members of neutral and allied nations.

The courts below have held that these allegations fail to state a claim upon which relief may be granted.

It may be mentioned at the outset that under Rule 9(b) of the Rules of Civil Practice "malice, intent, knowledge and other conditions of the mind may be averred generally". Malice therefore has been properly pleaded in this action. Also, the allegation of the complaint that the defendants Clark and Watkins in 1945 and 1946 joined the conspiracy, which originated in 1942 (19, compl. par. 22), is good pleading. As Judge Medina charged the jury in *United States* v. *Foster,* 1949, 9 F. R. D. 356, 377:

> "All the conspirators need not have originally conceived the conspiracy, or participated in its conception. Those who come in later with knowledge of the aims and purposes of the conspiracy, and cooperate in the common effort to attain the unlawful result become parties thereto."

No technical error in pleading the first cause of action has therefore been raised. There is but one issue upon

which this count stands or falls: Can these defendants be sued for false imprisonment committed maliciously, wilfully and without statutory power or duty but in the colorable exercise of the powers of their offices, or are federal officials, high or low in the hierarchy of their offices, like judges, immune from such suit?

This problem has puzzled the courts as far back as 12 Coke 23, where it was held by

> "all the Court of Star Chambers, that when a grand inquest indicts one of murder or felony, and after the party is acquitted, yet no conspiracy lies for him who is acquitted, against the indictors, * * *."

Here we find the early rule established (with which we take no issue) that grand jurors, public prosecutors, and judges shall not be held accountable for their acts of law enforcement, even if they are subsequently found to have been ill-advised.

The first case in the United States Supreme Court dealing with the immunity of judges is *Randall* v. *Brigham,* 74 U. S. 523, 7 Wall. 523, 19 L. Ed. 285. Mr. Justice Field wrote the opinion of the court and came to the conclusion that judges were not liable for acts done in the performance of their official duties, "unless, perhaps, when the acts in excess of jurisdiction are done maliciously or corruptly."

The question whether acts done by a judge maliciously or corruptly gave rise to damage claims came up in *Bradley* v. *Fisher,* 1871, D. C., 80 U. S. 335, 14 Wall. 335, 20 L. Ed. 646.

This case was the offshoot of the prosecution of John H. Surratt, one of the persons implicated in the murder

of President Lincoln. Judge Fisher had presided during the trial of Surratt; Bradley had been one of the attorneys defending Surratt. The jury sitting in this case disagreed and was subsequently discharged.

Thereafter, Judge Fisher from the bench stated that Bradley during a previous court recess, while the trial was progressing, had threatened him with chastisement for an alleged insult of counsel uttered by the judge from the bench in the course of the trial. Judge Fisher, from the bench, without giving Bradley a chance to say a word in his defense or in explanation, disbarred Bradley. Bradley, charging Judge Fisher with malice, sued him for damages, but the complaint was dismissed.

Again Judge Field wrote the opinion of the Supreme Court. He discussed his opinion in the *Randall* case and the modifying words contained in it holding open the possibility of a damage action where the judge acted in excess of jurisdiction and maliciously or corruptly. Said Judge Field (351):

> "In the present case we have looked into the authorities, and are clear, from them, as well as from the principle on which an exemption is maintained, that the qualifying words used were not necessary to a correct statement of the law, and that the judges of courts of superior and general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must here be observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter."

It should be noted that this decision was not unanimous, Justices Davis and Clifford dissenting. Judge Davis's dissenting opinion stated (357):

> "* * * I dissent from the rule laid down by the majority of the court, that a judge is exempt from liability in a case like the present where it is alleged not only that his proceeding was in excess of jurisdiction, but that he acted maliciously and corruptly. If he did so, he is, in my opinion, subject to suit the same as a private person would be under like circumstances."

These cases have established the extent to which federal judges may be held liable for their official acts. While judges cannot be prosecuted by civil action if acting in excess of jurisdiction, they can, it should be noted, be prosecuted in case of "clear absence of all jurisdiction over the subject-matter." In the present case the defendants would be liable under this rule for they had no jurisdiction whatever over a Frenchman (see footnote 8).

The principle underlying these two decisions was extended to a judge of the Supreme Court for the Philippine Islands in *Alzua* v. *Johnson*, 1913, 231 U. S. 106, 34 S. Ct. 27.

There are two Supreme Court decisions after the Civil War dealing with the immunity of federal officials from tort liability:

Spalding v. *Vilas*, 1896, 161 U. S. 483, 16 S. Ct. 631
and
Yaselli v. *Goff*, 1926, 275 U. S. 503, 48 S. Ct. 159, a memorandum decision affirming 12 F. 2d 396 (C. A. 2).

In *Spalding* v. *Vilas* the Postmaster General was sued for damages by a disgruntled attorney. Former postal employees had employed the plaintiff to press their claims for payment of certain back salaries. The Postmaster General thereupon advised the employees that they did not need an attorney for this purpose and that the payments would be made to them directly. This was done in conformity with an act of Congress. Upon the attorney's action against the Postmaster General for damages, the Supreme Court held that no action was maintainable and that plaintiff's allegation that the Postmaster General had been prompted by malice did not add to plaintiff's cause. The Court held that the acts of the Postmaster General were within his statutory powers and that, like judges of courts of superior jurisdiction, he could not be sued for acts done in performance of his duties.

If we may pause here for a moment, we see that this case extends the rule exempting judges from civil liability to administrative officials only if they act within their statutory powers. This decision in no way touches, or comes near to, the problems of the present case where a friendly alien was held by officials empowered only to hold enemy aliens.

Yaselli v. *Goff*, upon which the court below so heavily relies, is an action for malicious prosecution charging the defendant Goff, a special assistant to the Attorney General, with maliciously instituting before a Federal Grand Jury a criminal prosecution against plaintiff and with procuring an indictment which subsequently was brought to a trial, in which a directed verdict was rendered in favor of plaintiff. This case holds that public prosecutors are immune from liability for malicious prosecution based on an indictment and prosecution—acts all within their express statu-

tory powers—although it results in a verdict of not guilty rendered by the jury.

The facts of *Yaselli* v. *Goff* are not comparable to those of the present case. In the former, a charge of malicious prosecution was made against a public prosecutor who failed to prove his case to the satisfaction of the jury. In the present case, a friendly alien was maliciously and wilfully labelled as an enemy alien and then interned by public prosecutors who had *no statutory powers* over friendly aliens. In the former case, a man was placed before an unbiased court and jury that acquitted him after a fair trial. In the present case a man of dignity was held interned for four years and nine months without a trial, without a fair hearing, without being confronted with charges, without any just or colorable evidence against him that would tend to explain the rigors to which the plaintiff was exposed, and with full knowledge that he was a Frenchman as to whom no power of summary internment existed.[3]. This plaintiff was held a prisoner for almost five years without a judicial determination of any charges that might be laid against him. These defendants were not required to make their own determination whether the plaintiff was an alien enemy and subject to their plenary powers. The law gave the defendants the possibility of having questions of internment and removal adjudicated by our courts, pursuant to 50 U. S. C. 23, reading as follows:

> "Jurisdiction of United States courts and judges. After any such proclamation has been made, the several courts of the United States, having criminal

[3] Their own advisory board so informed them (13) ten days after the commencement of his internment (H. C. 226, 247). The Court of Appeals so informed them three years before plaintiff's release. *U. S. ex rel. D'Esquiva* v. *Uhl, infra,* footnote 9.

jurisdiction, and the several justices and judges of the courts of the United States, are authorized and it shall be their duty, upon complaint against any *alien enemy* resident and at large within such jurisdiction or district, to the danger of the public peace or safety and contrary to the tenor or intent of such proclamation, or other regulations which the President may have established, to cause such alien to be duly apprehended and conveyed before such *court, judge or justice;* and after *a full examination and hearing* on such complaint, and sufficient cause appearing, to order such alien to be removed out of the territory of the United States, or to give sureties for his good behavior, or to be otherwise restrained, conformably to the proclamation or regulations established as aforesaid, and to imprison, or otherwise secure such alien, until the order which may be so made shall be performed." (Italics supplied).

It is hereby contended that the defendants acted at their peril in making their own determination as to plaintiff's alien enemy character and detaining him for 4¾ years solely on their own determination of this basic jurisdictional fact[4],—particularly since they had the express legal

[4] The power to make a preliminary adjudication as to jurisdiction does not carry with it a power to *exercise* jurisdiction. The latter power may be granted only by Congress. In the court below defendants relied on the former power as statutory support for a claimed power to exercise jurisdiction over friendly aliens and citizens as well. Apparently, also, it is defendants' contention that the former power gave them the power *to continue to exercise* jurisdiction for three years after the second most important court in the country had told them that they were in error in their adjudication as to their jurisdiction and that they had *none* over Lorrainers like the plaintiff (footnote 9, *infra*). Under defendants' theory of jurisdiction advanced by them to the court below, 50 USCA App. 17 would have empowered them to arrest and intern—while they were making their own adjudication as to their jurisdiction over them—every person in the United States.

alternative of having doubtful questions of law determined by the courts. The defendants cannot now be heard to assert that they had the right to proceed administratively under 50 U. S. C. 21 or in the courts under 50 U. S. C. 23, and that they had the right to proceed one way or the other (*U. S. ex rel. Schlueter* v. *Watkins,* 1946, 67 F. Supp. 554 and 556). They had the right to proceed administratively against persons who undoubtedly were alien enemies. But where there was a doubt with respect to the alien enemy character of a person, they should have asked a court to adjudicate the problem. Surely they should have sought a judicial adjudication after the *D'Esquiva* opinion (*infra,* footnote 9) was promulgated. If they failed to do this, they acted at their peril, even if their motives had been proper.

Where the motives of defendant were improper, as alleged in the complaint, and where they also acted in excess of their statutory authority and with obvious lack of any jurisdiction over the plaintiff, they are clearly liable.

A representative case is *Wilkes* v. *Dinsman,* 1849, 48 U. S. 89, in which we find the following language:

> "Hence, while an officer acts within the limits of that discretion, the same law which gives it to him will protect him in the exercise of it. But when he acts beyond his jurisdiction, or attended by circumstances of excessive severity, arising from ill-will, a depraved disposition, or vindictive feeling, he can claim no exemption, and should be allowed none under color of his office however elevated or however humble the victim. (2 Carr v. Payne, 158, note; 4 Taunton, 67.)
>
> * * * the acts of a public officer on public matters, within his jurisdiction, and where he has a dis-

cretion, are to be presumed legal, till shown by others to be unjustifiable. (Cases cited.)

This, too, is not on the principle merely that innocence and doing right are to be presumed, till the contrary is shown. (1 Grenl., sec. 35-37.) But that the officer, being intrusted with a discretion for public purposes, is not to be punished for the exercise of it, unless it is first proved against him, either that he exercised the power confided in cases without his jurisdiction, or in a manner not confided to him, as with malice, cruelty, or wilful oppression * * *."

In *Tweed's* case, 1872, 83 U. S. 504 (p. 519) the Supreme Court held:

"* * * Whenever a person sued sets up a defense that he was an officer or an employee of the government acting under color of law, it plainly devolves upon him to show that the law which he invokes authorized the act in question to be done, and that he acted in good faith; * * *"

A modern decision applying the same rule is *Zimmerman* v. *Poindexter,* 1947, 78 F. Supp. 421. In that case Zimerman, a citizen of the United States, was interned and held as an alien enemy. Chief Judge McCormick of the Southern District of California, sitting in Hawaii, held that the defendants who interned Zimmerman are liable in damages. Judge McCormick stated the rule on page 423 as follows:

"The action before us involves an inquiry into the circumstances and necessities of the situation on December 7, 1941, and subsequent. (3) It has been held that personal liability attaches to executive or administrative officers who interfere in ways not authorized by law with the rights of citizens.

> The cloak of office is no protection to such officers evem when acting in good faith. See Stiles v. Morse, 233 Mass. 174, 123 N. E. 615, 4 A. L. R. 1365. (4) It is umdoubtedly true that the violation of official duty, as declared by statute, may be so remote as not to be material, but such situation does not, under the record in this action, apply at this stage of the proceedlings. And in order to ascertain the scope or degree of official responsibility and relevant attending consequences, it is necessary that the specific facts and circumstances involved in the concrete situation be examined evidentially."

The defendants who were there held to be liable in damages for the wrongful arrest and imprisonment of a citizen under the pretense that he was an alien enemy, included the governor of Hawaii, the head of the local F.B.I. and officers of the U. S. Army.

It is respectfully suggested that the rule of the *Zimmerman* case applies to the present case in which a Frenchman, a member of an allied nation, was maliciously held under the flimsy pretext that he was an alien enemy.

The decision of the Court of Appeals, of which review is sought, attempts to change this rule as set forth before. It paints a gloomy picture of what might happen to the common weal if public officers are liable for the consequences of their evil acts, for the consequences of the recklessness and malice with which they disregard our civil liberties. Public officials, it is reasoned, will be scared to act forcefully and vigorously if they have to face retribution.

We believe that such prophecy of gloom is founded on nothing but a superstition. It did not take a Hitler or a

Stalin to discover that it is easier to govern if the governed cannot talk back. Tyrants, from the beginning of the world, found it convenient to declare themselves sacrosanct. The continental law of Europe for a century has recognized the principle that public officials, acting maliciously, are liable in damages, and has established the principle that even the state may be sued where an official culpably infringes upon civil liberties. Art. 131 of the Weimar constitution[5] of Germany is an example of such legislation and Mr. Justice Robert H. Jackson of our Supreme Court, in his opening address for the United States in the Nuremberg Trial[6] mentioned with approval the German Protective Custody Act of 1916, adopted by the Reichstag during the First World War. Said he:

> "This Act guaranteed a judicial hearing within 24 hours of arrest, gave a right to have counsel and to inspect all relevant records, provided for appeals, and authorized compensation from Treasury funds for erroneous arrests."

The German republic foundered—not whilst this law was in force—but whilst and because it was suspended by the Nazis. Redress against unlawful arrests by public officials, as a matter of public policy, will not weaken the government but make it stronger. The torch in the hand of Liberty will shine brighter if we refrain from proceeding

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[5] "If a public official in exercising the powers of his public office violates the official duties he has toward a third party, the state or public corporation in whose service the official is, is liable therefor in principle. Recourse against the official is permitted. The right of civil action may not be excluded."

[6] Nazi Conspiracy and Aggression, Volume 1, U. S. Government Printing Office, Washington 1946, p. 128.

on the path of investing our public officials with absolute immunity from the consequences of their tortious acts.

It is therefore suggested that the first cause of action must be upheld and the decisions below reversed.

POINT II

The second count of the complaint must be sustained under the Civil Rights Act.

The second count of the complaint finds justification in subsection (3) of 8 U. S. C. 47, in the following language, which becomes quite clear if non-applicable parts of the language are omitted:

> "(3) If two or more persons in any State or Territory conspire * * * for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the law, or of equal privileges or immunities under the laws; * * * in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy whereby another is injured in his person or property * * * the party so injured * * * may have a cause of action for the recovery of damages, occasioned by such injury * * * against one or more of the conspirators."

It is alleged in the complaint that the defendants conspired to deprive plaintiff and many other persons (neutrals, allies and even citizens) of their liberty, which was one of said persons' privileges under the laws. The plaintiff was pursuant to this conspiracy detained for almost five years and thereby severely injured in his person.

Unless the defendants are of such high estate, as they seem to claim, that the laws of the United States do not mean what they say when applied to them, they are liable under section 47 of Title 8 U. S. C.

Thus far our courts seem to have applied this statute even to the high and mighty; they did not hesitate to hold the Governor of Pennsylvania and a judge liable in damages under the Civil Rights Act, although they acted in judicial capacities. Held the Court of Appeals, Third Circuit, in *Picking* v. *Pennsylvania R. Co.*, 1945, 151 F. 2d 240, 250, by Biggs, J.:

> "In making this statement we are not unmindful of the absolute privilege conferred by the common law upon judicial officers in the performance of their duties. Pertinent authorities relating to the common law privilege are collected and discussed in United States v. Chaplin, D. C. S. D. Cal. C. D., 54 F. Supp. 926, and in Allen v. Briggs, D. C. E. C. Pa., 62 F. Supp. 229. See also Jennings, Tort Liability of Administrative Officers, Selected Essays on Constitutional Law, Vol. 4, pp. 1271-1274. The absolute privilege was extended even to the conduct of judicial officers dictated by malice. But the privilege as we have stated was a rule of the common law. Congress possessed the power to wipe it out. We think that the conclusion is irresistible that Congress by enacting the Civil Rights Act sub judice intended to abrogate the privilege to the extent indicated by that act and in fact did so. Section 1 of the third Civil Rights Act explicitly applied to 'any person'. R. S. Section 1979 applies to 'every person'. We can imagine no broader definition. The statute must be deemed to include members of the state judiciary acting in official capacity. The result is of fateful

portent to the judiciary of the several states. See the statements of Chancellor Kent in Yates v. Lansing, 1810, 5 John., N. Y. 282, 291, 298. But the policy involved is for Congress and not for the courts. Assuming, as we think we must, that the provisions of Section 1 of the Civil Rights Act must be considered with the qualification set out in the last paragraph of footnote 12, infra, as in pari materia with Section 20 of the Criminal Code under consideration in the Screws case, the conclusion which we have expressed is foreshadowed by that decision, by the Classic case, supra, and by the decisions of the Supreme Court in the cases of Ex Parte Virginia and Virginia V. Rives, supra. For the reasons stated we conclude that the court below erred in dismissing the complaint as to Justice of the Peace Keiffer.

What we have said in respect to Keiffer applies to the dismissal of the complaint as to Governor James as the Chief Magistrate of Pennsylvania upon the motion filed by him."

Rehearing was denied in 152 F. 2d 753.

The court below in the present case (pp. 25, 26) contrary to the Picking decision (above) held:

"The first clause of the third subdivision of §47 does declare that, if two or more persons conspire to deprive 'any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws', the injured party may recover damages. The plaintiff's argument appears to be that this language creates a claim against any two persons who conspire to injure another for spite or other improper motives, apparently because to single out anyone for illegal aggression is to deny him equal protection of the laws. Quite aside from the fact that in order so to construe the words they

> must be broken from a context which shows their more limited meaning, it is apparent that they could not have had such a scope without destroying their validity constitutionally."

There seems to be obvious error in this language. The third subdivision of Section 47, as set forth above, gives a cause of action for conspiring to deprive a person of the equal protection of the law. The phrase "equal protection of the law" occurs in the 14th Amendment to the Federal Constitution, where States are prohibited from denying to any person the equal protection of the law. It has long been established that arbitrary action of an administrative officer may be the denial of equal protection.

Thus, it was held in *Thompson* v. *Spear,* C. A. Texas, 1937, 91 F 2d 430, cert. den. 1938, 302 U. S. 762, 58 S. Ct. 409, that where an enforcement agency exercises discretionary powers arbitrarily and unjustly, the enforcement of a valid regulation may be a denial of the equal protection of the law.

Again it was held in *Montgomery* v. *Suttles,* 1941, 191 Ga. 781, 13 S. E. 2d 781, and in *Howard Sports Daily* v. *Weller,* 1941, 179 Md. 355, 18 A 2d 210, that if a fair and impartial law is applied and administered by public authority with an evil eye and an unequal hand so as to make unjust discriminations between persons in similar circumstances, that is a denial of the equal protection of the law.

Defendants in the courts below made a point that the Civil Rights Act applies only to state officers. Lest confusion be created by the fact that the Civil Rights Act was enacted in the wake of the Fourteenth Amendment

which curbs discriminatory legislation and administrative action of the States, it must be emphasized that the Civil Rights Act also embraces acts of Federal officials. This was established by the Supreme Court in *Screws* v. *United States*, 1945, 325 U. S. 91, 65 S. Ct. 1031, where it was held, on page 1038 (65 S. Ct. 1038):

> "Some of the arguments which have been advanced in support of the contrary conclusion suggest that the question under section 20 (18 U. S. C. 51) is whether Congress has made it a federal offense for a state officer to violate the law of his State. But there is no warrant for treating the question in state law terms. The problem is not whether state law has been violated but whether an inhabitant of a State has been deprived of a federal right by one who acts under 'color of any law'. He who acts under 'color' of law may be a federal officer or a state officer. He may act under 'color' of federal law or of state law. The statute does not come into play merely because the federal law or the state law under which the officer purports to act is violated. It is applicable when and only when one is deprived of a federal right by that action. The fact that it is also a violation of state law does not make it any less a federal offense punishable as such."

That federal rights have been invaded in the present case is subject to no doubt. Mr. Justice Rutledge in his concurring opinion in the *Screws case* has enumerated some of them (325 U. S. 126, 65 S. Ct. 1047) as follows:

> "* * * the rights to a fair trial, including freedom from sham trials; to be free from arrest and detention by methods constitutionally forbidden. * * *"

The wilful arrest of this plaintiff, a peaceful inhabitant of the State of California, under "color" of the alien enemy statute, when defendants knew that plaintiff was not an enemy but a friend and citizen of an ally, and his continued detention while defendants concomitantly urged a definition of "alien enemy" which excluded the plaintiff and was diametrically opposed to the theory they publicly advanced to support their exercise of jurisdiction over the plaintiff (H. C. 85), is a flagrant violation of 8 U. S. C. 47. It was so intimated in Judge Knox's opinion in *U. S. ex rel. Grégoire* v. *Watkins*, 69 F. Supp. 889, 892, where the learned judge stated:

> "That the argument there (in the *D'Esquiva* case) made is inconsistent with the one here advanced seems obvious. The reason for the discrepancy is without explanation."

Once it is understood that federal officers are subject to the rigors of 8 U. S. C. 47, the relevance of the above quotation from *Picking* v. *Pennsylvania R. Co.*, is apparent. Defendants are liable just as was a state judge and a state governor.

POINT III

All defendants are liable in damages, irrespective of their stations on the hierarchic ladder.

It is apparent why not only the attorneys general but also the directors of the Alien Enemy Control Unit, Ennis and Cooley, and District Director Watkins are made parties defendant. The men on top plead exemption from liability under the ancient maxim: The King can do no wrong. The

men below plead exemption because of superior order. We suggest that enough has been said why exemption from liability cannot be invoked by the department heads. We also believe that little need be said about Ennis and Cooley. They of course prepared the decisions of their attorneys general and acted in conformity with them. If they were overruled by their superiors, they could resign. They did not have to go along where illegal acts were proposed.

It seems that this rule should also apply to Mr. Watkins. He was not a simple jailor or guard. He was a high government official and had to defend the habeas corpus cases in court. Pleadings and briefs of the plaintiff were served upon him and all pertinent facts were brought home to him. Is he any less guilty than his superiors, if he followed orders no matter what wrongs were inflicted on the plaintiff?

Besides, the defense of superior order is no longer recognized where wrongs are committed. Said Mr. Justice Jackson in his opening address in the Nuremberg Trial[7]:

> "The Charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of states. These twin principles working together have heretofore resulted in immunity for practically every one concerned in the really great crimes against peace and mankind. Those in lower ranks were protected against liability by the orders of their superiors. The superiors were protected because their orders were called acts of state. Under the Charter, no defense based on either of these doctrines can be

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[7] Nazi Conspiracy and Aggression, Volume I, Government Printing Office, Wash. 1946, p. 168.

entertained. Modern civilization puts unlimited weapons of destruction in the hands of men. It cannot tolerate so vast an area of legal irresponsibility."

Lest our argument be misconstrued, let us state with vigor that we do not wish to defame or slur the defendants' names by mentioning, in reference to this case, the Nuremberg trials. All we intend by quoting the above language of Mr. Justice Jackson is to show a rule of law applicable to this case which the eminent jurist chanced to enunciate on that occasion. But this rule of law, we respectfully urge, exists. It applies to these very dignified and exalted defendants as it applied to the Nazis. It applies to the culprit of Nuremberg, we suggest, as it applies to his judge.

POINT IV

A review by this court is a prime public necessity.

If *Yaselli* was correctly interpreted by the court below, it was overruled by *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 686-8 (1949), and by *Brady* v. *Roosevelt S.S. Co.*, 317 U. S. 575, 580-1 (1943), in which this Court reaffirmed "one of the fundamentals of the law of agency", which "applies even to certain acts of public officers", i.e. that an agent is personally liable for his own torts, even if he is an agent of the United States and was purportedly acting as such at the time of the tortious act, as was the defendant in the *Brady* case. The instant complaint charges the defendants with personal wrongdoing, with active participation in and knowledge of the wrongdoing of their subordinates. It was *only* because "there is nothing in the evidence to connect the defendant personally" with the

wrongful act of his subordinates that the Collector of Customs was held not liable in *Robertson* v. *Sichel,* 127 U. S. 507, 515 (1888), in which this Court pointed out, however, that "the subordinate who was guilty of the wrong, if any, would undoubtedly be liable personally for the tort". Particularly applicable at this time—when more than 10.5% of all employed persons in the United States are government employees (U. S. Bureau of Census, *Public Employment in October 1949,* G-GE49-No. 4; *Monthly Report on Labor Force,* Series P-57, No. 89) and more than 4% of the total population of the United States are government employees (U. S. Bureau of Census, *op. cit.*; *Estimates of Population, July 1949,* Series P-25, No. 32)—is the following from *Hopkins* v. *Clemson College,* (1910), 221 U. S. 636, 642-3, 31 S. Ct. 654, 656:

> "Immunity from suit is a high attribute of sovereignty—a prerogative of the State itself—which cannot be availed of by public agents when sued for their own torts. * * * *To grant them such immunity would be to create a privileged class free from liability for wrongs inflicted or injuries threatened.* Public agents must be liable to the law, unless they are to be put above the law. For how 'can the principles of individual liberty and right be maintained if, when violated, the judicial tribunals are forbidden to visit penalties upon individual defendants * * * whenever they interpose the shield of the State? * * * The whole frame and scheme of the political institutions of this country, state and Federal, protest' against extending to any agent the sovereign's exemption from legal process. * * * Neither a State nor an individual can confer upon an agent authority to commit a tort so as to excuse the perpetrator. In

> such cases * * * the wrongdoer is treated as a principal and individually liable for the damages inflicted."

This Court's answer to the premise of the court below, that the instant complaint was against "an officer who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good" (R. p. 24) and who had no statutory jurisdiction over such "others",[8] has been that such officer is personally liable in tort for the damages resulting from the vent of his spleen. A denial of the instant application for a writ of certiorari, in the face of the explicit opinion below, will surely be construed hereafter as an approval by this Court of public officers venting their spleens with complete immunity from liability to their victims. The question is not whether petitioner will be able to prove his allegations,[9]

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[8] Implicit in the opinion below is its opinion in *U. S. ex rel. Schwarzkopf* v. *Uhl*, 137 F. 2d 898, 903 (1943, 2nd), construing the same statute under which the instant petitioner was incarcerated by defendants: "The statute does not authorize the apprehension and detention of all persons whose presence here may be found by the President to be dangerous to public safety. Unfortunately, even citizens of the United States or aliens owing allegiance to some friendly nation, may disregard their duty and commit acts favoring the enemy. But they cannot for that reason be held in custody under the statute in question." Therefore, the premise of the court below in the instant case must have included a concession that defendants had *no statutory power or duty* to incarcerate the instant petitioner.

[9] The instant petitioner was held in detention by defendants for more than three years after they were informed by *U. S. ex rel. D'Esquiva* v. *Uhl*, 137 F. 2d 903, 905 (1943, 2nd) that

> "An Alsatian should not be held subject to detention as an alien enemy merely because (unlike other members of his family, for example) he happened to have been born after the original cession of Alsace to Germany and prior to its return to France in 1919."

or even whether the complaint does in fact allege that defendants acted only through personal malice against petitioner and solely in order to vent their spleens upon him. The court below assumed that the instant complaint did so allege, thus distinguishing this case from *Gibson* v. *Reynolds*, 172 F. 2d 95, 98, 99-100 (1949, 8th), in which the complaint was not so construed but in which it was said, however, that

> "When an officer performs an act under color of his office with such motives (spite, ill-will, revenge, greed or avarice) as the actuating cause * * * or clearly without any right to act, * * * the cloak of his office furnishes him no protection from civil actions for an injury perpetrated. * * * When * * * facts are made to appear which justify the conclusion that the officer was maliciously pursuing the litigant and not the attainment of the object of his statutory duty * * * the immunity which would otherwise have existed ceases."

And thus distinguishing this case also from *Glass* v. *Ickes*, 117 F. 2d 273, 275, 281 (1940, CADC), in which it was pointed out that the allegedly libelous statement was true in fact and, also, that defendant "did not exceed his authority, nor pass the line of his duty as Secretary of the Interior" in issuing the statement complained of.

The opinion of the instant court below does exactly what the concurring opinion in the *Glass* case feared might happen, that (p. 282)

> "we may have extended the rule beyond the reasons out of which it grew and thus unwittingly created a privilege so extensive as to be almost unlimited and altogether subversive of the fundamental principle that no man in this country is so high that he is above the law."

Conclusion

The present case is an example of an adjudication on the part of the Court of Appeals in total disregard of statutes and precedents. This trend in our courts was deplored by Mr. Justice Roberts in his dissenting opinion in *Mahnich v. Southern S. S. Co.*, 1944, 321 U. S. 96, 112; 64 S. Ct. 455. We would surely develop into a police state were the decision below allowed to stand, i.e. were this Court to give its tacit approval to the doctrine that a public officer is immune from liability for a tort inflicted on a person over whom he had no statutory power and against whom he was merely "venting his spleen" (p. 24). It is therefore respectfully prayed that:

Certiorari should be granted.

Respectfully submitted,

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